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Is a lease guaranty still enforceable if modified without the guarantor's consent? - by Noble Allen and Diane Rojas

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A guaranty secures the faithful and timely performance of a tenant's obligations under a lease and ensures that the landlord can legally pursue the guarantor in the event of a tenant's default. But what happens when the landlord and tenant make subsequent changes to the lease without the guarantor's consent? Does it matter that the guarantor agreed to waive any notice regarding future amendments? Can the landlord continue to hold the guarantor responsible for the tenant's default under the modified or amended lease?

Short answer: It depends on the jurisdiction, so we will provide a sampling of how this issue might be interpreted in some of the New England states and New York.

A landlord may or may not be able to hold the guarantor liable if the lease was amended without some sort of endorsement from the guarantor. Some states, like Massachusetts and Rhode Island, will strictly enforce the language in the guaranty. Other states, like New Hampshire, Connecticut and New York will evaluate the enforceability of the guaranty based on a variety of circumstances. So that even if the guaranty contains a “continuing guaranty” provision, which is often unlimited in time, and also does not require notice to, or consent of, the guarantor, a landlord may still be left unprotected in certain jurisdictions.

In Massachusetts, courts and applicable statutes will strictly defer to the language of a continuing guaranty in order to determine a guarantor’s liability. So a court in Massachusetts will enforce a guaranty that waives the guarantor’s right to notice of amendment to the lease or defense of liability.

Rhode Island courts follow a similar practice and will enforce a continuing guaranty that expressly and unambiguously waives any requirement to notify the guarantor of subsequent amendments.

Applying a slightly different variation, courts in New Hampshire will discharge a guarantor’s liability if the original agreement that formed the basis of the guaranty has been materially altered without the guarantor’s consent, such that it injured the guarantor’s interests. At the same time, a court in New Hampshire might also likely enforce a guarantor’s liability even without the guarantor’s signed consent provided that the guarantor in some fashion had indicated that he would have signed a subsequent amendment to the agreement.

Connecticut courts will evaluate the enforceability of a continuing guaranty based on the intentions of the contracting parties. Even when a continuing guaranty is intended to be unlimited in time or contains a notice waiver, Connecticut courts will generally limit a guarantor’s liability to a period of time that is reasonable in light of all the circumstances of that particular case. In other words, the outcome will require a case-by-case factual analysis.

In New York, a guarantor will not be bound beyond the express terms of the guaranty, so a guarantor will be released from liability under the guaranty if the lease is modified in any manner without the guarantor’s consent. Based on this well-settled principle, a guarantor’s waiver of notice regarding future lease modifications might not necessarily overcome the rule that the guarantor must always consent to a lease modification.

Given the uncertainty in how some states might interpret the enforceability of a continuing guaranty, it would be prudent (to the extent feasible) for landlords, as a matter of course, to adopt a rule that requires that the original guarantor must sign a reaffirmation of guaranty any time that the original lease is amended or modified. This will ensure that the guarantor’s liability will be fully enforceable in the event that the tenant defaults.

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